



78-1795

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

ALFRED H. HARDWICK,

Petitioner

v.

NU-WAY OIL CO., INC.
AND
BILLY DELP

RESPONDENTS' BRIEF
IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

(Hereafter "R" refers to the
Record and "St." refers to
Stipulation.)

Respondents (hereafter jointly referred to as "Defendants") desire to correct the Statement of the Case presented by Petitioner (hereafter "Plaintiff") to the extent that such statement tends to blend the self-service gasoline sales operation with the grocery store operation. Such distinction was carefully noted by the District Court and the United States Court of Appeals for the Fifth Circuit in their respective opinions. Hardwick v. Nu-Way Oil Co., Inc., 589 F2d. 806 (5th Cir., 1979); 443 F. Supp.

940 (S.D. Tx., 1978). This distinction emerges from the final stipulation filed with the District Court, a portion of which is set forth verbatim as follows:

"108. All Nu-Way, Dynamic or Economy stations (hereafter referred to jointly as "Company") have been acquired substantially as follows:

(a) Company purchases or leases improved real property and thereafter installs purchased or leased tanks, pumps and electronic metering consoles necessary to the operation of a self-service gasoline station; or

(b) Company purchases or leases unimproved real property and thereafter erects a building and installs leased or purchased tanks, pumps and electronic metering consoles necessary to the operation of a self-service gasoline station; or

(c) Company enters into an arrangement with an owner or lessee of land with a drive-in grocery either already on it, or about to be constructed, whereby Company acquires the right to install pumps, tanks and electronic metering consoles necessary to the operation of a self-service gasoline station.

"109. Typically, in categories (a) and (b) of Paragraph 108 above, Company will operate a small store in the nature of a drive-in grocery store for the purposes of selling a limited selection of groceries and snack-type items. The majority of the stations in November and Dec-

ember, 1971, came within category (c) of Paragraph 108 above.

"110. In categories (a) and (b) of Paragraph 108 above, Company would construct and assume responsibility for the operation of the store, whereas in category (c) of Paragraph 108 above, operation of the store continues on the part of the owner of the real property with no participation whatsoever by Company.

"111. In categories (a) and (b) situations of Paragraph 108 above, (38 stations for Nu-Way, Economy and Dynamic) Company owns and operates both the grocery store and gasoline sales operations and Company pays social security taxes on the employees operating such store and withholds income taxes from employees' salaries. In such cases, Company controls and directs the manner and details of operation of both the grocery store and the gasoline sales. In category (c) of Paragraph 108 above (126 stations for Nu-Way, Economy and Dynamic) Company does not pay social security taxes or withhold income taxes from the remuneration paid by Company to the store owner/operator. In category (c) Company enters into contracts with the individual already operating the store or preparing to operate a store.

"112. The FIRST STATION location in Ricardo, Texas, was at all times relevant to this suit a category (c) type operation as set forth in Paragraph 108 above.

"113. In a category (c) operation as set forth in Paragraph 108 above, the relationship between Company and the store owner/operator is generally as follows:

Company

- (a) Installs, at its sole cost, pumps, tanks, consoles, and all gasoline sales equipment; upon termination of arrangement with operator removes, at its cost, all pumps, tanks and gasoline sales equipment.
- (b) Maintains and repairs at its sole cost pumps, tanks and consoles.
- (c) Bears liability to extent created by common law or statute for injuries to persons or property caused by the gasoline sales operation; carries insurance to cover this liability.
- (d) Receives from operator either directly or by deposit in Company bank account all income from gasoline sales and pays operator monthly by Company check.
- (e) Supplies at its cost the gasoline put in the tanks and sold from the premises of Owner/Operator; Company, through its representative, orders in its name all gasoline from refiner/supplier and has responsibility for paying for such gasoline.

- (f) Pays all federal, state and local taxes applicable to gasoline sold as well as personal property taxes on gasoline sales equipment, and indemnifies operator from liability for such taxes. Has no tax liability for real estate serving as site for station location.

- (g) Retains title to all gas until gas is run through pump meters.
- (h) Has risk that if owner/operator becomes bankrupt, foreclosure proceedings may be instituted against owner/operator's real estate and store.

Store Owner/Operator

- (a) Supplies at his sole cost, building space for placement of consoles and shelter for persons collecting money; utilizes own cash register for gas sales receipts and supplies building furnishings to extent incidental to both gasoline and grocery operation.
- (b) Maintains and repairs the store building at its sole cost; reports to Company any breakdown or malfunction of equipment; makes reasonable efforts to protect Company's equipment.
- (c) Bears liability to extent created by common law or statute for injuries to persons or property caused by him and his employees' participation in the gasoline sales operation and his position

as owner or occupier of the land. Bears cost of any insurance to cover this liability.

- (d) Receives from Company fixed sum monthly, or in some cases, a fixed sum monthly plus a commission of usually 1 cent per gallon of gasoline sold.
- (e) Supplies at his cost all utilities servicing the location; notifies Company's representative of gasoline volume remaining in tanks, and of competitor's prices; changes price of gasoline on pumps and signs at Company's order.
- (f) Has no tax liability for gas sales or gas equipment, but has all tax liability for real estate serving as site for station location.
- (g) Promotes and devotes his best efforts to the furtherance of the customers and furnishes all personnel necessary to attend the equipment and collect for sales of gasoline; maintains Nu-Way's books and records reflecting such things as daily pump readings and cash receipts.
- (h) Bears liability for any bad checks accepted by him without Company's approval and for any credit extended by him on gasoline sales without Company's approval; bears liability for the discrepancies between pump readings and collections where discrepancies in Company's opinion exceed normal losses. Has risk that if Company becomes bankrupt and cannot afford to remove

tank and pumps, owner/operator may have problem getting tanks removed.

"114. In all stations, whether they are in category (a), (b) or (c) of Paragraph 108 above, gasoline sales are usually made in the following manner, to-wit:

The customer drives his vehicle next to a pump, customer fills his own car or truck with gasoline and then goes to the building located on the premises (usually the grocery store) and pays cash to the operator, who can verify the amount of the sale on electronic consoles inside the building, which consoles automatically record data from the pumps. In no station are services provided to customer's vehicles, such as battery checks, windshields cleaned, oil changes, tires checked for air, and so forth, as are customarily performed in what is commonly called a 'major' or 'brand-name' full service station." (R. 505-508, St. 108-114)."

The Nu-Way operation in Ricardo, Texas was a category (c) type of operation (R. 506, St. 112).

In addition, neither Marcelina Meza Hardwick nor Plaintiff ever carried insurance covering damages to the gasoline pumps, tanks and metering consoles at the Nu-Way Station (R. 508, St. 115, 116). Neither Plaintiff nor Marcelina Meza Hardwick ever paid personal property taxes on the tanks, pumps and metering consoles located on the Nu-Way Station, nor did they file any forms with any

State, federal or local taxing authority setting forth liability for payment of taxes attributable to gasoline sold from the station (R. 508, St. 118, 119). Nu-Way maintained all permits and licenses required by law in connection with gasoline sales operations (R. 508, St. 117). Nu-Way did not issue credit cards nor accept charge cards for gasoline purchases from any of its stations (R. 508, St. 120). Nu-Way never submitted invoices or other statements to Plaintiff or Marcelina Meza Hardwick requesting payment for gasoline delivered to the Nu-Way Station (R. 509, St. 123). Nu-Way always made payment for gasoline delivered to the station location by the refinery, or other bulk distributor (R. 438, 476, 507, St. 113). Sums of money received from all gasoline sales from the Nu-Way Station were deposited by both Plaintiff and Marcelina Meza Hardwick directly to a Nu-Way bank account (R. 509, St. 124).

REASONS FOR DENYING THE WRIT

Plaintiff's Petition for Writ of Certiorari should be denied because:

(1) The decision of the Court of Appeals is not in conflict with the decisions of any other Court of Appeals or the United States Supreme Court;

(2) The decision of the Court of Appeals is well within the accepted and usual course of judicial proceedings.

The Supreme Court in its analysis of vertical price fixing allegations has consistently held that the actual relationship of the parties, as it exists in fact as well as in written contracts, is crucial to the

determination of the relationship of the parties - i.e., whether there exists a genuine consignment or a sham consignment and whether there exists a wholesale-to-retail vertical price fixing scheme or simply a retail marketing structure accomplished through a genuine agency relationship. Simpson v. Union Oil Company of California, 377 U.S. 13 (1964); United States v. Schwinn, 388 U.S. 365 (1967); and United States v. Masonite Corporation, 316 U.S. 265 (1942).

This Court in Simpson, for example, looked to the actual relationship between a gasoline supplier and an independent businessman, and refused to allow the gasoline supplier to evade the prohibition against price fixing through clever draftsmanship. The Court stated, however, that:

"... we hold only that resale price maintenance through the present coercive type of 'consignment' agreement is illegal under the antitrust laws

A corollary to the principal that one may not avoid liability through cleverly drawn consignment contracts is that liability should not be imposed on parties as a result of inartfully drawn contracts which, on the surface, appear to reveal an illegal price fixing scheme. Thus, the Fifth Circuit in this case, as in prior cases, correctly determined that its "... task, then, is to analyze the substance of the agreement between Nu-Way and Marcelina Meza Hardwick . . ." (Hardwick v. Nu-Way Oil Company, Inc., supra at 809).

The Court of Appeals correctly determined that, on the facts of this

case, Marcelina Meza Hardwick did not possess the "indicia of entrepreneurs" vital to the Court's rationale in Simpson, and that Nu-Way, as a retailer of its product, was entitled to set the price at which it sells its own products. Supra at 809, 811.

Close analysis of the stipulated facts and opinions of both the Court of Appeals and the District Court, reveals that both Courts, instead of being at variance with Simpson, undertook to apply carefully the guidelines of Simpson to the facts, and such decisions are well within the accepted and usual course of judicial proceedings.

CONCLUSION

For the foregoing reasons, it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,


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ATTORNEY IN CHARGE
FOR RESPONDENTS

CERTIFICATE OF SERVICE

I do hereby certify that I have delivered three (3) copies of the foregoing Respondents' Brief in Opposition to a Writ of Certiorari to Counsel of record herein by personal delivery thereof to Mr. Bill Blackburn, 1200 The 600 Building, Corpus Christi, Texas 78473, and to Mr. J. Bonner Dorsey, 1200 The 600 Building, Corpus Christi, Texas 78473, this 15 day of June, 1979.


PAUL G. KRATSIG